

BEFORE THE  
GOVERNING BOARD OF THE  
EVERGREEN SCHOOL DISTRICT  
COUNTY OF SANTA CLARA, STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of  
Certain Certificated Employees,

Respondents.

OAH No. 2012030775

**PROPOSED DECISION**

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on April 24 and May 2, 2012, in San Jose, California.

Jonathan A. Pearl, Dannis Woliver Kelley, represented the Evergreen School District.

Christopher E. Schumb, Attorney at Law, represented the respondents identified in Appendix A, which is attached hereto.

The matter was submitted for decision on May 2, 2012. On May 3, 2012, counsel for the Evergreen School District sent a letter to counsel for respondents and to the Office of Administrative Hearings advising that the District had rescinded layoff notices to six respondents. Respondents' counsel was given the opportunity to object to re-opening the record to admit the letter, but did not do so. The record was re-opened and the letter was marked as Exhibit 20 and admitted into evidence. The matter was resubmitted for decision on May 4, 2012.

Because this matter was continued for hearing from April 24, 2012, until May 2, 2012, the time for decision by the Evergreen School District was extended as permitted by law.

**FACTUAL FINDINGS**

1. Katherine Gomez made and filed the accusation in her official capacity as the superintendent of the Evergreen School District (District).

2. Respondents are certificated employees of the District.

3. On February 9, 2012, the governing board of the Evergreen School District adopted Resolution No. 11/11-12 (PKS Resolution), reducing or discontinuing particular kinds of services for the 2012-2013 school year, and directing Carole Schmitt, the Director of Human Resources, to send appropriate notices to all employees whose services might be terminated.

The PKS Resolution identified the services to be reduced no later than the beginning of the 2012-2013 school year as:

Elementary Teachers	14.0 FTE <sup>1</sup>
Elementary Prep Teachers	6.8 FTE
Librarian	0.5 FTE
Middle School Assistant Principals	1.5 FTE
Total:	22.8 FTE

4. The services set forth in the governing board's PKS Resolution are particular kinds of services that may be reduced or discontinued within the meaning of Education Code section 44955. No service is being reduced below a mandated level.

5. The governing board's reduction of services was prompted by the District's projected state and federal revenues, demographic data and projected enrollment. Before the governing board adopted the PKS Resolution, it was notified of a resignation from one certificated employee with a multiple subject credential working in a 0.5 FTE position.<sup>2</sup> The governing board also considered attrition data from prior school years in order to determine the necessary reduction of services for the 2012-2013 school year.

6. On February 9, 2012, the governing board adopted Resolution No. 12/11-12 (Same Date of Hire Resolution), containing the criteria for establishing the order of termination among respondents who have the same date of first rendering paid service, and the order of termination among respondents. One of the tie-breaking criteria was CLAD<sup>3</sup> certification.

Before March 15, 2012, Schmitt and Brian Wheatley, the president of the Evergreen Teachers Association, conducted the tie-breaking pursuant to the Same Date of Hire Resolution. Ties between teachers with the same seniority date were resolved via lottery.

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<sup>1</sup> Full-Time Equivalent.

<sup>2</sup> Etheria Hakim resigned her 0.5 FTE multiple subject credential position in September 2011.

<sup>3</sup> Crosscultural Language and Academic Development.

7. Before March 15, 2012, Schmitt served 27 employees written notice of her recommendation that their services would not be required for the ensuing school year. Each notice set forth the reasons for the recommendation.

8. Respondents timely requested a hearing to determine if there was cause for terminating their services for the ensuing year. The District timely served respondents with an accusation packet which included a statement to respondents, accusation, copies of appropriate Education and Government Code sections, a notice of defense and a notice of hearing. Each respondent who received an accusation packet, filed a timely notice of defense. All prehearing jurisdictional requirements have been met.

9. At its April 19, 2012 meeting, the governing board determined it would not reduce the middle school assistant principal positions, or the librarian position, which had been part of the PKS Resolution.<sup>4</sup>

10. Prior to the hearing in this matter, the governing board rescinded the layoff notice issued to Jason Neiser. On May 3, 2012, the District rescinded notices issued to Ruth Hambley, Suzanna Jones, Susana Faria, Kori Lundberg, Jason Stull and Katherine Oblennis Yvonovich.<sup>5</sup> The accusations against these individuals will be dismissed. Twenty respondents remain in this proceeding.

11. After March 15, 2012, the District received notices that six certificated employees with multiple subject credentials, who shared contracts in the 2011-2012 school year, intend to return to work full-time for the 2012-2013 school year. These six certificated employees had been granted a 0.5 FTE leave of absence for the 2011-2012 school year and are entitled to return to their full-time positions. These six certificated employees are higher on the seniority list than respondents.

12. After March 15, 2012, the District received notice that two certificated employees with multiple subject credentials, who had been on 1.0 FTE leaves of absence in 2011-2012, plan to return to work full-time for the 2012-2013 school year. The District was also notified that one certificated employee with a multiple subject credential who had been on a 1.0 FTE leave of absence, plans to return to work at 0.5 FTE, for the 2012-2013 school

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<sup>4</sup> The individuals occupying these positions had not been noticed for layoff due to their level of seniority and teaching credentials.

<sup>5</sup> At hearing the following issues were raised with regard to these respondents: 1) whether respondent Jones should be allowed to bump into a social science teaching position in the middle school; 2) whether respondent Faria should be given credit for five or six years in prior experience; 3) whether respondent Hambley should be given credit for nine or eleven years in prior experience; and, 4) whether respondent Stull should be allowed to bump into a middle school position. Because the layoff notices to these individuals have been rescinded and the accusations against them will be dismissed, these issues are moot.

year. The certificated employees holding these 2.5 FTE are higher on the seniority list than respondents.

13. Certificated staff with multiple subject credentials occupying 9.0 FTE will be resigning or retiring before the 2012-2013 school year. Due to the increase in the number of employees returning from leave, the District may not be able to offset the number of layoffs with the total amount of positively assured attrition. In other words, there may be no positions available despite the retirements and resignations because of the number of employees returning from leave. However, the District represented that it will consider all positively assured attrition before sending out final layoff notices.

#### *Respondents' Issues*

14. Trin Trinh is a permanent certificated employee who was hired in 1996. She holds a multiple subject credential and an emergency CLAD certification. Respondents argued that Trinh cannot teach next year because she is not CLAD certified. CLAD certification is only a consideration if the tie-breaking criteria must be applied. It is not a condition of Trinh's employment for the 2012-2013 school year. Trinh's status therefore does not affect the layoff.

15. Respondents argued that the District must retain four of the respondents to fill in for certificated employees who will be on leave in the 2012-2013 school year. Although Schmitt testified that she might be able to fill those temporary positions with four of the respondents, a school district has the discretion to determine whether to hire temporary employees to fill in for teachers on a leave of absence. (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831, 848.) Thus, this contention fails.

16. Respondents argued that one of them must be assigned to teach a 0.40 FTE class in AVID (peer counseling) at Quimby Oaks Middle School which is currently taught by a more junior teacher who also teaches science for the balance of her 1.0 FTE position. None of the respondents holds a credential which would allow him or her to teach science in the middle school. Assignments are generally within the discretion of the school district, and efforts to force a district to split a full-time position to accommodate part-time bumping rights have been disfavored. (See, *Hildebrandt v. St. Helena Unified School District* (2009) 172 Cal.App.4th 334.) Respondents' argument is rejected.

17. Respondents also argued that a number of temporary employees hired in the 2011-2012 school year, were hired due to a surge of enrollment, and therefore, those positions were not truly temporary, resulting in permanent positions that must be made available to respondents. Respondents have cited no authority to support their argument that a school district can be forced to convert temporary positions into permanent positions. Moreover, respondents' argument is unpersuasive because the governing board did a comprehensive analysis of its needs and adopted the PKS Resolution based upon that analysis. The governing board's wisdom in deciding to reduce particular kinds of services,

or in setting its budget priorities, is not an issue in this proceeding. (*California School Employees Association v. Pasadena Unified School District* (1977) 71 Cal.app.3d 318.)

18. Respondents further argued that the District must reduce the size of the layoff by the amount of positively assured attrition without taking into account more senior certificated employees who are returning from a leave of absence. This would result in the District retaining the services of junior employees for positions that will be filled by senior employees returning from leave. Respondents cite no authority for this proposition, and this claim is rejected.

19. Respondent Angelica Rodriguez asserted that she should be classified as a permanent employee, rather than a probationary employee. The District's records indicate that after being laid off, respondent Rodriguez was re-hired as a substitute teacher on multiple occasions and in one long-term position during the 2010-2011 school year. Respondent Rodriguez abandoned this claim at hearing and the parties agreed to resolve it as a re-hire issue. Because Rodriguez is the respondent with the least seniority, determination of this issue will not affect the layoff and will not be decided.

#### *Other Matters*

20. All contentions made by respondents not specifically addressed above are found to be without merit and are rejected.

21. No permanent employee is being terminated while a permanent or probationary employee with less seniority is being retained to render a service which the permanent employee is certificated and competent to render.

22. The cause for the reduction in particular kinds of services relates to the welfare of the schools and the pupils thereof.

### LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

2. The services referenced in the PKS Resolution set forth in Finding 3 are the kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell Elem. Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

3. Cause for elimination of up to 20 FTE positions exists in accordance with Education Code sections 44949 and 44955.<sup>6</sup> The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

4. By reason of the matters set forth in Finding 10, there is no cause pursuant to Education Code section 44955 to give a final notice to respondents Jason Neiser, Ruth Hambley, Suzanna Jones, Susana Faria, Kori Lundberg, Jason Stull and Katherine Oblennis Yvonovich.

5. Notice may be given to the remaining respondents that their services will not be required for the ensuing school year.

#### ORDER

1. In accordance with Factual Finding 10, the accusations against respondents Jason Neiser, Ruth Hambley, Suzanna Jones, Susana Faria, Kori Lundberg, Jason Stull and Katherine Oblennis Yvonovich are dismissed.

2. Notice may be given to the remaining respondents that their services will be reduced or eliminated for the 2012-2013 school year.

DATED: \_\_\_\_\_

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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>6</sup> Although the PKS Resolution called for a 20.8 FTE reduction, in light of the rescission of layoff notices to seven respondents, only 20 respondents remain.

## Appendix A

### Evergreen School District List of Respondents

Last	First
Begin	Ashley
Caldwell	Roberta
Derama	Judy
Drori	Liatt
Faria	Susana
Gereaux	Michelle
Gonzalez	Holly
Hambley	Ruth
Huynh	Tam
Jaffa	Andrea
Jones	Suzanna
Kuwada	Trisha
Lundberg	Kori
Morgan	Mai
Munguia	Manuel
Neiser	Jason
Nunes	Cindy
Opray	Deborah
Ordasi	Anna
Pritchett	Lindsey
Rodriquez	Angelica
Sato	Lisa
Shirakawa	Beulah
Stull	Jason
Vu	Mai Anh
Young	Cherese
Yvanovich	Katherine